



June 3, 1999

Ms. Laura McElroy
General Counsel
Texas State Board of Pardons and Paroles
Price Daniel, Sr. Building, Suite 500
209 West 14th St.
Austin, Texas 78701

OR99-1541

Dear Ms. McElroy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123939.

The Board of Pardons and Paroles (the "board") received a request for "access to any and all clemency files for convicts who have been executed, from January 1997 to the present." In a letter dated February 12, 1999, you claimed that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 508.313(a) of the Government Code. By letter dated March 1, 1999, you provided to this office representative samples of the requested information, including records under a federal court seal in *Moody v. Scott*, No. 1:94-CV-041-C (N.D. Tex., filed March 4, 1994).¹ In letters dated March 5 and March 18, 1999, you also claimed that the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.101 in conjunction with specific statutes and with judicial orders. In a letter dated April 9, 1999, the requestor supplemented his request. On April 30, 1999, you submitted additional documents as a representative sample of information responsive to the supplemental request. We have considered the exceptions you claim and reviewed the submitted information.

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit a representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Pursuant to section 11(b) of article IV of the Texas Constitution, the Board of Pardons and Paroles advises the Governor on matters concerning reprieves, commutations of punishment, and pardons. Section 508.044(b) of the Government Code imposes on the board the duty of determining which inmates will be paroled and the terms of parole. Section 508.050 provides for the board, upon the request of the Governor, to investigate and report to him about persons he is considering for pardon, commutation of sentence, reprieve, and forfeiture.

Section 552.101 of the Government Code excepts from required public disclosure information that is made confidential by law, including information made confidential by statute. You contend that section 508.313(a) of the Government Code applies to the requested clemency files and that the confidentiality afforded by that statute does not lapse upon the death of the inmate.

Section 508.313 originated in the "Adult Probation and Parole Law of 1957," article 781d of the Code of Criminal Procedure. In 1987, the legislature amended that law to specifically include victim impact statements and inmates' arrest records as part of the confidential and privileged information obtained by the board in connection with inmates. *See* Act of May 26, 1987, 70th Leg., R.S., ch. 441 §2, 1987 Tex. Gen. Laws 2019, 2020. Section 508.313(a) of the Government Code provides:

(a) All information obtained and maintained, including victim protest letters or other correspondence, victim impact statements, lists of inmates eligible for release on parole, and an arrest record of an inmate is confidential and privileged if the information relates to:

(1) an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee;² or

(3) a person directly identified in any proposed plan of release for an inmate.

A statutory confidentiality provision must be express; a confidentiality requirement will not be implied from the statutory structure. Open Records Decision No. 465 (1987). By its terms, section 508.313(a) makes confidential information that concerns three categories of

²"Releasee" means a person released on parole or to mandatory supervision. Gov't Code § 508.001.

persons: (1) inmates of the Texas Department of Criminal Justice's ("TDCJ") institutional division who are subject to parole, release to mandatory supervision, or executive clemency; (2) releasees (persons released on parole or to mandatory supervision); and (3) a person directly identified in any proposed plan of release for an inmate. This office has applied the predecessor provision of section 508.313(a) to the board's pardon files, but only when such files concern an inmate. *See* Attorney General Opinion H-427 (1974); Open Records Decision No. 190 (1978); *see also* Gov't Code § 508.052(a) (permitting TDCJ to provide the board access to TDCJ's computerized and printed records).

In Attorney General Opinion H-917 (1976), we first announced that this office would follow the uniform rule that the common-law right of privacy lapses upon death. *See* Open Records Decision No. 272 (1981). We have determined, however, that there is no similar presumption that prohibitions against disclosure in confidentiality statutes lapse upon the death of the subject of the information. Attorney General Opinion DM-61 at 3 (1991), JM-851 at 2 (1988); *see also* Attorney General Opinion JM-229 (1984); Open Records Decision No. 529 (1989). Whether a confidentiality provision lapses upon death is a question of statutory construction. Attorney General Opinion DM-61 at 3 (1991); Open Records Decision No. 524 at 3 (1989). We have previously stated that a confidentiality provision will lapse upon death when the statute is enacted merely to protect information that would be covered by a common-law right of privacy or when the statute only protects a living person's privacy. Open Records Decision Nos. 536 (1989) (provision which protects police officer's photograph ceases to apply after death of officer), 524 at 3 (1989) (confidentiality of student records under Gov't Code § 552.114 lapses upon death). In other instances where we have found that a statutory provision would lapse upon death, we have determined that the statute was specifically applicable to living persons, and the circumstances involved the release of the information in question based on another statutory obligation. Attorney General Opinion DM-61 (1991) (death certificates); Open Records Decision No. 529 (1989) (autopsy reports). For example, in Open Records Decision No. 529 (1989), we stated that a confidentiality provision prohibiting the release of an AIDS test result would lapse upon death because the confidentiality provisions were expressed in language applicable to living persons, and a contrary interpretation would interfere with a medical examiner's statutory obligation to make full inquest reports. Conversely, we have held that when nothing in the statute indicates that the legislature intended the confidentiality provisions to apply only during lifetime, the statutory protection would not lapse upon the death of the subject of the information. Attorney General Opinion JM-851 at 2 (1988), JM-229 at 4 (1984).

At the time that the requested information was obtained and maintained by the board, it related to an inmate subject to executive clemency. After reviewing section 508.313, we find nothing in the statute itself to indicate that the legislature intended the provision to apply only during the lifetime of the inmate. Furthermore, the confidentiality provision appears

to protect more than the inmate's privacy interests. It protects the deliberations of the board by encouraging frank and open discussion in its decision-making process. We conclude, therefore, that the board must withhold the requested information under section 508.313 of the Government Code. Attorney General Opinion JM-851 (1988). Section 508.313 of the Government Code remains in force after the death of the inmate.

Having ruled that the requested information is confidential under section 552.101 in conjunction with section 508.313 of the Government Code, we need not address your other arguments. Documents that you acknowledge are public documents should be released to the requestor promptly. Gov't Code § 552.221.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH\nc

Ref: ID# 123939

Encl: Submitted documents

cc: Mr. Mike Ward
Austin American-Statesman
305 S. Congress Ave.
Austin, Texas 78704
(w/o enclosures)